SINGAPORE REPORTS

MALAYAN MOTOR & GENERAL UNDERWRITER (PTE.) LTD. v. M.H. ALMOJIL

[C.A. (Wee Chong Jin C.J., Lai Kew Chai & Chua JJ.) March 31, 1982]

[Singapore — Civil Appeal No. 36 of 1981]

Shipping Law — Marine Insurance — Hull policy — Mixed policy — Implied warranty of seaworthiness — Surveyor's report on sufficient compliances with Warranty(c) — — Effect of — Marine Insurance Act, 1906, ss. 25, 39(1), (5), & 52.

Marine Insurance — "Approved surveyor" — "Seaworthiness" — Meaning of — "Voyage" and "time" policies distinguished.

The respondent had his ship insured for $1.25 million "at and from or for the period:- From April 21, 1975 to April 20, 1976" with the appellants. The said policy contained *inter alia*, a warranty as follows "(a) Trading within Persian Gulf but including one delivery from Singapore to Persian Gulf on its own steam sailing on or about April 21, 1975. (b) Panamanian Loadline and Maintained. (c) Subject to satisfactory condition survey by approved surveyors."

The respondent's vessel encountered rough weather between Singapore and Colombo where she had to put in for extensive repairs at Colombo. Subsequently she left for Damman. On September 8, 1975, some 15 miles off the coast of Iran, the vessel ran aground and eventually listed to portside and capsized. It was not disputed that the vessel was totally lost as a result of the perils of the sea. However, the appellants as underwriters denied liability under the policy. The court below awarded the respondent $1.25 million and costs for the total loss of the said vessel under the policy of marine insurance. The underwriters appealed.

Held, allowing the appeal: (1) unseaworthiness will only be a defence available to underwriters if the ship was insured under a voyage policy and not a time policy;

(2) the policy in this case was not a time policy *simpliciter* but was a "mixed policy" affording a cover of 12 months and attaching as from and on the voyage from Singapore to the Persian Gulf;

(3) the implied warranty of seaworthiness under section 39(1) of the Marine Insurance Act 1906 applies to the voyage part of the aforesaid mixed policy;

(4) the learned trial judge in arriving at his findings of seaworthiness had failed to consider the evidence of 2 expert witnesses. In the circumstances, the vessel was not seaworthy and the respondent was in breach of the warranty of seaworthiness;

(5) there was no reason to disturb the learned trial's judge's findings that the time spent at Colombo was reasonable;

(6) the survey report tendered by one Vesuna on behalf of the respondent was not in compliance with the Warranty (c) and there was no evidence that Vesuna was an "approved surveyor" within the meaning of that expression in the warranty; "Approved surveyor" means a surveyor approved by underwriters in Singapore;

(7) the learned trial judge was wrong to have found waiver. Compliance with Warranty (c) by the respondent was a condition precedent to the risk attaching. Section 52 of the Marine Insurance Act 1906 required premium to be paid and on a failure of consideration, the premium was repayable. Hence, the issue of the policy and the collection of the premium did not constitute an estoppel or amount to a waiver of the breach of warranty.

Cases referred to:-

(1) *Wilson* v. *Boag* [1956] 2 Ll.R. 564.

(2) *Steel* v. *State Line S.S. Co.* (1877) 3 A.C. 72, 77.

(3) *P. Samuel & Co. Ltd.* v. *Dumas* [1924] All E.R. 66, 77 H.L.

(4) *The Mihalios Xilas* [1976] 3 All E.R. 865, 872.

COURT OF APPEAL.

A.G.S. Pollock Q.C. (*A.P. Godwin* with him) for the appellant.

N.A. Phillips Q.C. (*J. Grimberg* with him) for the respondent.

Cur. Adv. Vult.

Lai Kew Chai J. (delivering the judgment of the Court): This is an appeal against a judgment in which the appellants as underwriters were ordered to pay to the respondent the sum of $1,250,000 and costs for the total loss of the respondent's vessel "AL-JUBAIL IV" ("the vessel") under a policy of marine insurance dated April 19, 1975.

Several issues were canvassed before the learned judge who decided in favour of the respondent on all of them. In deciding, *inter alia*, that the vessel was seaworthy at the commencement of the voyage from Singapore to Damman, Saudia Arabia, the learned judge had proceeded on the basis that there was an implied warranty of seaworthiness under the policy but in view of his findings the respondent was not in breach of the same.

Against this judgment, this appeal was brought before us. By a respondent's notice, the respondent sought to support the judgment by contending in the first place that the policy was either a time policy or, alternatively, a mixed time and voyage policy such that there should not have been implied a warranty of seaworthiness. In effect, the respondent was saying before us that it was unnecessary for the learned judge to consider and decide as to whether or not the vessel was seaworthy.

The facts giving rise to the claim are as follows. In early 1975 the respondent bought the vessel from Singapore Shipping Industries (Private) Limited ("SSI") for $1.25 million. The vessel was one of the "Ford Class Seaward Defence Boats", which was a class of British naval vessels built post World War II for coastal defence. SSI had bought the hull and pursuant to their agreement with the respondent they had it completely refitted in Singapore in accordance with the drawings of a naval architect. The respondent, who was engaged in Saudi Arabia in the business of construction of oil refineries and off-shore installations, required the vessel to ferry 30 to 40 persons to and from platforms at sea covering distances of about 50 to 60 kilometres. It was a small vessel intended for work in coastal areas. Its freeboard was just over 4 feet amidship. After its refitting, it was propelled by two diesel motors of 600 horse power each. After all the usual trading certificates were obtained, the vessel was registered as a Panamanian vessel on May 19, 1975.

Pursuant to their agreement, SSI arranged for the delivery of the vessel to the respondent from Singapore to Damman and also effected on behalf of the respondent a hull policy on the vessel dated April 19, 1975 with the appellants. The sum insured was $1.25 million. The policy was in the usual form and as regards the period of cover the material words were: "at and from or for the period:— From 21st April, 1975 to 20th April, 1976 (both days inclusive)." The 12 month period of cover was later amended to commence from the date the vessel left Singapore.

SSI delivered the vessel to the respondent on or about May 23, 1975 and the vessel sailed from Singapore for Damman on May 30, 1975. The vessel intended to proceed directly to Damman. But on reaching the Indian Ocean, the vessel encountered stormy winds and high seas. The vessel pitched and rolled. The seas were shipped on board. The radar ceased to function. There was too much deviation in the steering. The electrical wirings became soaking wet. The main engines were malfunctioning and were over heating. So the vessel, after 14 days at sea, had to put in at Colombo, Sri Lanka, for repairs.

In Colombo, it was found that the vessel had suffered two serious heavy weather damages. The main engines were misaligned due to the heavy pounding of the vessel at sea. Gunawardena, the Government Engineer and Ship Surveyor in Colombo who surveyed and supervised the extensive repairs, was of the view that the misalignment of the main engine could not have existed when the vessel left Singapore. There would have been excessive overheating of the stern tubes and vibrational stresses would have been so noticeable that no master or engineer of a vessel would have allowed the vessel to sail. Repairs were carried out to the engines, the propeller shafts and the steering gear. The port and starboard intermediate shafts of the vessel were replaced. The other serious defect was the deterioration of the electrical insulations which had taken in sea water in the exposed parts. It was also a heavy weather damage suffered in transit at sea.

The repairs in Colombo took more than two months. After the repairs, sea trials were carried out. On August 28, 1975 Gunawardena certified that the vessel was in a seaworthy condition and that it was permitted to undertake the second leg of the voyage from Colombo to Damman, "calling at intermediate ports as found necessary."

The vessel left Colombo the next day for Damman. According to Tanagavelu, by then the first officer of the vessel, the vessel was sailing well although after Bombay, India the weather was worse than the bad weather which was experienced between Sumatra and Colombo.

On September 8, 1975 the vessel was some 15 miles off the coast of Iran. That night, heavy weather was again encountered by the vessel. No lights were visible from the shore. The radar was again out of order. Just before midnight, the vessel ran aground three times. On the last grounding, the vessel listed to portside and eventually capsized. The crew abandoned the vessel and after going through some harrowing experience, they reached Teheran. A week later, they were repatriated to Singapore. It is not in dispute that the vessel was totally lost as a result of the perils of the sea but the appellants as underwriters denied liability under the policy.

As the major issues raised in this appeal turn on the true construction of the policy, it is necessary to quote the exact terms of the other material parts of the policy. It contains the usual "touch and stay at any ports or place" clause. It is subject to the Standard Institute Total Loss Only Clause (1.10.70) including sue and labour, salvage and salvage charges. There is the crucial warranty in three paragraphs, namely:—

"Warranted:

(a) Trading within Persian Gulf but including one delivery from Singapore to Persian Gulf on its own steam sailing on or about 21st April 1975.

(b) Panamanian Loadline and Maintained.

(c) Subject to satisfactory condition survey by approved surveyors."

In the law of marine insurance, it is well known that in a voyage policy there is a warranty by the insured that a ship would be seaworthy on sailing but not if it is a time policy: see subsections 39(1) and (5) of the Marine Insurance Act, 1906 ("the Act"). Unseaworthiness therefore will only be a defence available to underwriters if the ship is insured under a voyage policy and not a time policy. Section 25 of the Act also provides:

"Voyage and time policies —

Where the contract is to insure the subject matter 'at and from' or from one place to another or others, the policy is called a 'voyage policy', and where the contract is to insure the subject matter for a definite period of time the policy is called a 'time policy'. A contract for both voyage and time may be included in the same policy."

The first question in this appeal, which was raised by the respondent's notice, is whether the policy in question is a time policy or, alternatively, whether it is only such a mixed policy that the respondent had not warranted that the vessel would be seaworthy on sailing from Singapore. If the answer to this question is in the affirmative, obviously, there is no question of the respondent having warranted that the vessel would be seaworthy on sailing from Singapore and accordingly no breach on the part of the respondent could arise. It was canvassed on behalf of the respondent that this policy is a time policy. The contract in terms and in essence, it was contended, is to insure the vessel for a definite period of time and not between two termini. It was also urged on behalf of the respondent that a time policy is still a time policy even where it restricts the geographical area and counsel relied on *Wilson* v. *Boag*.[1] In our view, this case is not helpful to the respondent. The words of the policy and the factual background are distinctly different. There was a cover for four months whilst the "Irene" was used for private and pleasure purposes within a radius of 50 miles of the Port Stephens of New South Wales, Australia. During the period of the policy the "Irene" left Port Stephens on a voyage to Sydney, some 90 miles away. While still within the 50 mile perimeter it became disabled and drifted. Salvage charges were incurred for which a claim was made under the policy. Underwriters unsuccessfully sought to argue that the policy was a "mixed policy", that there had been a change of voyage and that the loss was incurred while the "Irene" was embarked on a voyage to Sydney which was outside the scope of the policy. The Supreme Court of New South Wales held that it was a time policy under which the underwriters were to be liable for losses occurring within the geographical area. The voyage to Sydney was regarded as irrelevant. In effect, the court declined to apply the rules of law relating to commercial voyage policies as to do that had seemed to them "to be unreal". The substance of the trans-

action was looked at and effect was given to it. We would do likewise.

In construing this policy and ascertaining the intention of the parties, we look at the whole policy and the terms used in it for their plain, ordinary and popular sense. We also look at all the surrounding circumstances known to the parties at the time the contract of insurance was made: see *Halsbury's* Laws of England, 4th edn., paras. 43 and 45. The material terms of the policy are already set out. The commercial context is briefly this. The respondent had the vessel just refitted in Singapore. It was a vessel intended for work in protected waters. It had to sail the Indian Ocean for its delivery to the Persian Gulf. The appellants or their agents were told very little about the type and size of the vessel. If the vessel had reached Damman it was intended for use to ferry passengers or workers within protected waters in the Persian Gulf. Seeing the size and type of the vessel, the "delivery" voyage over the Indian Ocean at this particular period of the year in which weather was turbulent would be a factor of crucial importance to both owner and underwriters.

We are accordingly of the opinion that the policy here in question is not a time policy *simpliciter* but is a "mixed policy" affording a cover of 12 months and attaching as from and on the voyage from Singapore to the Persian Gulf. It also contains a limitation of liability of the appellant underwriters to a loss sustained while the vessel is trading within the Persian Gulf.

We now turn to the second branch of the respondent's argument against implying a warranty of seaworthiness by the respondent. Counsel submitted that even if this is a "mixed policy", the implication of the warranty of seaworthiness does not automatically follow. A mixed policy is neither a voyage policy nor a time policy. Accordingly, neither subsection 39(1) nor subsection 39(5) of the Act applies. Both counsel agreed that there is so far no direct authority where a warranty of seaworthiness has been implied into a mixed policy. So this question has to be decided on principle, the historical basis in which the warranty of seaworthiness was annexed to a voyage policy, and common sense. As a matter of principle, the implication of any term into a contract is only permissible if it is both necessary and reasonable to work the contract. Why was the warranty of seaworthiness implied in the past in the case of voyage policies? The principle reason was that an assured was usually in control and possession of a vessel before a vessel embarked on a voyage and was able to do something about and comply with any obligation as regards the seaworthiness of a vessel. So the warranty of seaworthiness was implied in voyage policies and legislative expression was given to it by subsection 39(1) of the Act.

In this case, the respondent as the assured, was in possession and control of the vessel before it left Singapore and began what would clearly be the most turbulent part of its life in the 12 month period. This part of the cover was between two termini and the policy so far as the delivery voyage was concerned had all the attributes of a voyage policy. In these circumstances, the answer to an officious bystander's question whether the assured warrants the seaworthiness of the vessel must be a categorical affirmation.

On the question whether the vessel was seaworthy, the learned trial judge has found as a fact that it was seaworthy. His judgment on this issue reads:

> "One issue of fact was whether the vessel was in a seaworthy condition when it left Singapore. On the evidence I have narrated, in particular, the survey reports made by K. R. Vesuna, the trading certificates issued by Maritime Inspection Corporation, and the evidence of Gunawardena, I find that the vessel was in all respects seaworthy at the commencement of the delivery voyage from Singapore to the Persian Gulf."

The vessel, as we had stated earlier, was converted into a crewboat pursuant to drawings prepared by a qualified Naval Architect. The vessel then went through an exhaustive survey in Singapore by K.R. Vesuna. He was a naval architect and the former Government Ship Surveyor in Singapore who was then in private practice as a marine engineer and ship surveyor. It has to be noted that Vesuna's survey report only touched on the hull and condition of the vessel for classification purposes. It did not address itself to the important question whether the vessel could withstand the ordinary perils of the delivery voyage at that particular time of the year. The survey report was solely for the purpose of getting the classification of the vessel to satisfy the Panamanian authorities and for their issue of the trading certificates.

On the basis of the surveyor's report, the trading certificates of the vessel were issued on July 14, 1975 by the Maritime Inspection Corporation, an approved Panamanian Surveyor in Singapore. One of the certificates, the Loadline Certificate, contained this endorsement:

> "This Certificate is restricted for trading only in the Gulf of Arabia and between nearby countries with a delivery voyage Singapore to Gulf of Arabia."

Although it was in apparent compliance with warranty (a) of the policy, we have to observe that on the evidence there was no basis for such an endorsement. It was certainly not derived from Vesuna's survey report.

In fact the undisputed evidence of two experts as regards the suitability of the vessel for the "delivery voyage" from Singapore to the Gulf of Arabia went the other way. They were Mr. Richard Nicholas Frappell, a Master Mariner and a general marine surveyor, a witness for the respondent and Captain W.P. Clark, also a Master Mariner and general marine surveyor, a witness for the appellants.

Mr. Frappell said in examination-in-chief:—

> "I will not describe this vessel an ocean-going vessel. She was suitable for coastal and local trade.
>
> I will not recommend a vessel of this size and description to undertake the voyage from Singapore to Damman between the months of May and October. It is because of the south west monsoon conditions in the Indian Ocean. High seas would have put this craft in difficulty. Force 7 or 8 of wind referred to in evidence of PW1 would have resulted in accompanying high seas and heavy swell and would put a vessel of this type in a precarious position.
>
> Free board is the height of the hull out of water. This vessel had a free board of just over 4 feet amidship. Normally the freeboard aft would be even less.

The effect of rough seas on this type of vessel is more severe than on a larger and heavier vessel."

In cross-examination, Mr. Frappell again confirmed that if he had been required to give a general condition survey of the vessel, he would have said that it should not have made the voyage from Singapore to Damman at the time of the year it did. He would have warned underwriters against the risk. This firm view was reinforced by the appellants' witness, Captain W.P. Clark, another Master Mariner and Marine Surveyor, who had testified to the same effect. The learned trial judge in arriving at his finding of seaworthiness failed to consider the evidence of these two witnesses.

What amounts to seaworthiness? It is not a fixed but a relative standard varying according to the ship and the exigencies of each voyage. "The ship should be in a condition to encounter whatsoever perils of the sea a ship of that kind, laden in that way, may be fairly expected to encounter": *Steel* v. *State Line S.S. Co.*,[2] *per* Lord Cairns. We are, in the circumstances, of the opinion that the vessel was not seaworthy and the respondent was in breach of the warranty of seaworthiness.

The next ground under which the appellants sought to deny liability is that in the course of the voyage from Singapore to Damman, the vessel was delayed at Colombo for 79 days to complete non-essential repairs for excess of the heavy weather damages which we have described. They relied on section 48 of the Act and contended that the unreasonable delay had terminated the risk. We should not be too astute in looking at every repair effected in Colombo and the period of time each item of repair would have taken. Having considered all the evidence touching on the extent of the repairs in Colombo, we find no ground to disturb the learned judge's findings that the time spent at Colombo was reasonable.

We now turn to the major question in this appeal. Did the respondent comply with warranty (c)? The appellants submitted that the learned trial judge had erred in holding that Vesuna's report was a sufficient compliance with warranty (c). This question raises two issues of construction of warranty (c). They are:—

(1) Was the survey done by Vesuna in May 1975 a "satisfactory condition survey" within the contemplation of the warranty; and

(2) Was Vesuna an "approved surveyor" within the meaning of that expression in the warranty?

In approaching the construction of warranty (c), we have to look at the expressed words and the "factual matrix" in which the warranty was agreed. When the appellants were approached to underwrite the risks, they knew nothing about the condition and suitability of the vessel, particularly its suitability to withstand the rigours of the delivery voyage at the period of time the voyage was contemplated. The appellants therefore stipulated warranty (c). The survey was clearly for insurance purposes and not just for the classification of the vessel which was merely required for its registration under the Panamanian flag. Warranty (b) had already dealt with the requirements of classification. The purpose of warranty (c) was to require an approved surveyor to consider the physical condition of the vessel *and* its suitability overall for the adventure. In other words, the surveyor has to consider the risk of the delivery voyage. It is not in dispute that Vesuna's survey report did not in any way touch on the suitability overall of the vessel for the adventure. His report was accordingly not "a satisfactory condition survey" within the contemplation of the warranty. Indeed, there was no evidence that the respondent or his agents in SSI had made any attempt to comply with warranty (c).

For the appellants it was also submitted, and we accept the submission, that the expression "approved surveyor" means a surveyor approved by underwriters in Singapore. This is the reasonable construction. There is no evidence that either Vesuna or the Maritime Inspection Corporation were approved by underwriters in Singapore generally.

We accordingly conclude that Vesuna's survey report was not in compliance with warranty (c) and that there was no evidence that Vesuna was an "approved surveyor" within the meaning of that expression in the warranty.

At the end of the judgment the learned trial judge said that even if the respondent was in breach of warranty (c), the appellants had waived the breach. He was impressed by the fact that the appellants had issued the policy and had collected the premium. He also found that the appellants had only asked for the "satisfactory condition survey" one week after they were notified of the casualty. He found waiver on these facts and he relied on section 34(3) of the Act and what Viscount Cave said in *P. Samuel & Co. Ltd.* v. *Dumas*.[3] We accept the appellants' submission that the learned judge was wrong to have found waiver. The policy had already been issued. The appellants were not under a duty to ask for the "satisfactory condition survey" under warranty (c). Compliance with warranty (c) by the respondent was a condition precedent to the risk attaching. Section 52 of the Act required premium to be paid and on a failure of consideration, the premium was repayable. Accordingly, waiver either by election or estoppel as adumbrated in *The Mihalios Xilas*[4] by Kerr J. (as he then was) cannot arise in this case.

Accordingly, we allow the appeal with costs here and below.

Appeal allowed.

Solicitors: *Godwin & Co.*; *Drew & Napier.*